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In The

Supreme Court of the United States

October Term, 1994

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO AND LOCAL 7232, UNITED PAPERWORKERS INTERNATIONAL UNION,

Petitioners,

v.

BRIGGS & STRATTON CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY RESPONDENT

The Respondent, Briggs & Stratton Corporation ("Briggs & Stratton" or the "Company") objects to the form and substance of the "Questions Presented for Review" in the Petition For A Writ Of Certiorari (the "Petition") and believes the question should be posed as follows:

> Whether the Seventh Circuit misinterpreted Sections 3 and 16 of the United States Arbitration Act in holding this case was not "referable to arbitration" under § 3 and no appellate jurisdiction existed under § 16, because the Unions, defendants in a federal court damage action under 29 U.S.C. § 185, did not file a grievance or otherwise invoke the arbitration process, which left the district court with no pending arbitration, to which it could have deferred.

PARTIES

The names of all parties to this case appear, and are correctly set forth, in the caption of the Petition.

Briggs & Stratton is a Wisconsin Corporation duly organized and incorporated under the laws of the State of Wisconsin. It has no subsidiaries, other than those which are wholly owned; it has no parent company.

The United Paperworkers International Union ("UPIU") has also been previously referred to as the International Union, Allied Industrial Workers ("AIW"), and Local 7232, United Paperworkers International Union ("Local 7232") has also been previously referred to as AIW, Local 232 and AIW, Local 232A. The UPIU and Local 7232 will be referred to collectively as the "Unions."

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STATEMENT OF FACTS

The facts of this case were succinctly set forth in the decision of the Court of Appeals for the Seventh Circuit at 36 F.3d 712, 713-14 (7th Cir. 1994) and are recited, in relevant part, as follows:

Briggs & Stratton Corporation has a collective bargaining agreement with Local 232 of the Paperworkers Union. The workers promised that during its terms they would not participate in "any concerted slow down, strike, work stoppage or other concerted interruptions of Company operations relative to any dispute amenable to the arbitration provisions of the labor agreement." In August 1993 Briggs & Stratton reorganized its Large Engine Division. Local 232 and its parent international (collectively, "the Union[s]") believed that the changes, which altered the way in which seniority could be exercised, violated the terms of the collective bargaining agreement and called on its members to "work to rule" – that is, to enforce every picayune rule found in the contract and the plant's operating procedures. It aimed to place economic pressure on the employer. Local 232 urged its members to reject overtime assignments, and the faithful shunned and put other social pressure on workers who displayed a lack of enthusiasm for the job action. The Unions also filed a grievance and took the dispute about the new organization to arbitration.

Contending that the [work to rule] campaign was "concerted slow down" forbidden by the agreement, the employer filed this suit under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking [monetary damages and] an injunction requiring its workers to

resume work as usual. The Unions asked the district court to dismiss the claim[s] under Fed. R. Civ. P. 12(b)(6) for failure to arbitrate or, at a minimum, to order the employer to present its demand to an arbitrator and to stay proceedings in the interim. The district court denied both requests on February 15, 1994, ruling that the collective bargaining agreement "is not susceptible to a construction that the company is bound to arbitrate its claim for damages against the Unions for breach of the no-strike clause." From this decision the Unions [appealed]. The Court of Appeals for the Seventh Circuit noticed the interlocutory nature of the appeal presented "an obvious question of appellate jurisdiction" and ruled it had none. *Briggs & Stratton v. Local 232, Intern. Union*, 36 F.3d 712, 716 (7th Cir. 1994). The Unions filed a petition for a writ of certiorari on March 23, 1995.

SUMMARY OF ARGUMENT

The Petition should be denied because the Unions failed to demonstrate any recognized basis to issue a writ of certiorari as there is no important question of federal law raised by the holding of the Court of Appeals for the Seventh Circuit, which clarified the simple procedural mechanism for obtaining stay under § 3 of the United States Arbitration Act, 9 U.S.C. §§ 1-16, and the standard for conferring appellate jurisdiction under § 16 of the Act.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision of the Court of Appeals does not raise the questions presented in the Petition.

There is no important question of federal law in this case, nor is there a split in the circuits on the applicable rule of law, that could provide a basis for granting the petition for a writ of certiorari. The Court of Appeals for the Seventh Circuit applied the correct legal standard in this case under the United States Arbitration Act, based on this Court's holding in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S. Ct. 834 (1995). The Unions cite a split in the circuits over the issue of whether the Arbitration Act applies to collective bargaining agreements as the primary basis for seeking a writ of certiorari. That precise issue, however, was never addressed by the courts below because it was never raised by the Unions.

There is no controversy involving an important question of federal law in this case because Court of Appeals applied the correct legal analysis under the Arbitration Act. The recent holdings of this Court in the cases of *Allied-Bruce*, and *Mastrobuono v. Shearson, Lehman, Hutton, Inc.*, ___ U.S. ___, 115 S. Ct. 1212 (1995), interpreted § 2 of the Arbitration Act to control arbitration agreements "involving" commerce, which is limited only by the constitutional constraints of the Commerce Clause, as distinguished from the language of § 1 of the Act that refers to workers actually "engaged in" interstate commerce, which excludes coverage of the Act. In *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), this Court recognized the issue of whether the

Arbitration Act applies to collective bargaining agreements; in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), this Court left the issue undecided; but, in *Allied-Bruce* and *Mastrobuono*, the interpretive analysis of the Court effectively resolved the issue in favor of coverage. *Allied-Bruce*, 115 S. Ct. at 841; *Mastrobuono*, 115 S. Ct. at 1216. These cases implicitly interpreted the § 1 exclusion's term "engaged in" commerce narrowly, when they held that the Arbitration Act governs any agreements "involving" interstate commerce, limited only by the powers of the Commerce Clause and the exclusion of § 1. *Allied-Bruce*, 115 S. Ct. at 839-841. However, rather than using the broad terms "involving" or "affecting" commerce, Congress chose the narrower exclusionary language "workers engaged in foreign or interstate commerce" to define the limits of the § 1 exclusion. The exclusion, thus, does not apply to goods manufactured at a fixed site outside the transportation industries (i.e., that are not goods or services actually "in" interstate commerce). Because the exclusion of § 1 does not apply, the Arbitration Act controls. The Act's application in this case was correct because Briggs & Stratton is not an employer in the transportation industries within the exclusion of § 1, but rather, a manufacturer of goods at a fixed site, that eventually involve or affect commerce, within the meaning of § 2 of the Act.

Even assuming, without conceding, that the Unions are correct that the Arbitration Act does not apply to collective bargaining agreements generally, their argument nevertheless fails under the holding of *Gulfstream Aerospace v. Mayacamas Corp.*, 485 U.S. 271 (1988). The district court's Order in this case was nothing more than

its decision not to take action and to proceed to judgment in the ordinary course of litigation. There is no order enjoining or compelling either party to do anything. Thus, in the absence of an order having injunctive effect, this case falls into the broad category of the denial of stays that was addressed when this Court overruled the *Enelow-Ettelson* doctrine in *Gulfstream Aerospace*, 485 U.S. at 282-83. Therefore, appellate jurisdiction could not have existed under 28 U.S.C. § 1292(a)(1) – even if the Unions arguments are correct. The insufficiency of the Unions' reasoning presents an additional basis for denying review.

The Court of Appeals for the Seventh Circuit framed the issue, and simultaneously dispensed with the Unions' arguments in support of the Petition, as follows:

> Our circuit is among the minority that has limited Section 1 [of the Arbitration Act] to the transportation industries and therefore applies the Arbitration Act to most collective bargaining agreements. *Pietro Scalzitti Co. v. Operating Engineers*, 351 F.2d 576, 579-80 (7th Cir. 1965). Neither side has asked us to revisit *Pietro Scalzitti*, so we turn to Section 16 of the Arbitration Act to decide whether we have appellate jurisdiction.

Briggs & Stratton v. Local 232, 36 F.3d 712, 715 (7th Cir. 1994). The only question presented to the Court of Appeals, and thus addressed, was whether this case met the procedural requirements of §§ 3 or 4 of the Arbitration Act, which could give rise to appellate jurisdiction under § 16. The Court of Appeals went on to make one

holding: the procedural prerequisites of § 3 of the Arbitration Act had not been satisfied, thus, no appellate jurisdiction existed under § 16 of the Act.

2. The decision of the Court of Appeals sets forth a simple procedural rule for obtaining appellate review of a denial of the stay of in-court litigation, pursuant to Section 16 of the Arbitration Act, that does not conflict with any decision of this Court

The decision of the Court of Appeals is a simple reading of § 16 setting forth a procedural rule based on the text of §§ 3 and 4 of the Act; this case is not a decision interpreting 28 U.S.C. § 1292(a)(1) or 9 U.S.C. § 1. In addressing the question of appellate jurisdiction under § 16, the Court of Appeals looked to § 3 of the Arbitration Act to determine whether a stay had been properly requested; if so, the denial of the request would be appealable under § 16. Section 3, however, refers to a pending dispute being "referable to arbitration" to proceed "in accordance with the terms of the agreement" as if to assume, if not require, a currently pending grievance or arbitration to which a court could defer when issuing a stay. In this case, neither side requested arbitration, much less was the contractual mechanism ever affirmatively invoked. It naturally followed that, as the appellate panel learned at oral arguments (and ultimately concluded), neither party desired arbitration. The Company sought to prevail in federal court; the Unions wanted the case dismissed outright. Accordingly, the appellate panel held, as a matter of fact, that there was no pending arbitration – because neither party wanted it – to which the district court could have deferred. Therefore, the case was not

referable to arbitration within the meaning of §§ 3 or 4 of the Arbitration Act, which resulted in a lack of appellate jurisdiction under § 16.

The arguments in the Petition demonstrate that the Unions actually seek a rehearing of their arguments in support of their Motion to Dismiss, for failure to exhaust alternative contractual remedies, that was initially presented to the district court. However, because their arguments failed in the Courts below, the Unions employ a new legal theory, based on an alleged split between the circuits over the applicable rule of law. The only rule to be gleaned from the Court of Appeals' decision, however, is that courts will not compel two parties to arbitrate a dispute when neither party desires arbitration. *Briggs & Stratton v. Local 232, Intern. Union*, 36 F.3d 712, 716 (7th Cir. 1994). No court has ever held that they must.

This case demonstrates that when parties fail to act affirmatively in litigation, they cannot rely upon the courts to issue orders interpreting their desires. The essence of this case was uncovered at oral argument before the Seventh Circuit when, as the appellate decision indicates, "both sides treated arbitration as a poor cousin." *Briggs & Stratton*, 36 F.3d at 715. The Court of Appeals merely decided it had no jurisdiction to review the question of a stay pending an arbitration that neither party to the dispute wanted. The decision went on to set forth a simple procedural rule under § 3 of the Arbitration Act that provides clear guidance to future disputes over arbitrability issues in the Seventh Circuit. The arguments of Petitioners miss the point.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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